

# THE U.S. SUPREME COURT'S USE OF NON-LEGAL SOURCES AND *AMICUS CURIAE* BRIEFS IN *FISHER v. UNIVERSITY OF TEXAS*

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## I. Introduction

In February 2012, the U.S. Supreme Court agreed to hear a case that challenged the constitutionality of a race-conscious admissions policy at the University of Texas at Austin (“the university”). In addition to the evidence put forward by the parties, a broad constituency of individuals and organizations on both sides of the debate mobilized to inform the Court of the arguments under consideration. For example, *amici curiae* in support of the university presented research to impress upon the Court the need for postsecondary institutions to be permitted to consider race as one among myriad factors in admissions to fulfill their educational missions. *Amici* in support of *Fisher* also submitted a wide range of sources to support arguments that the university’s race-conscious policy did not meet the requirements of the Equal Protection Clause. Four years later in 2016, the Court ultimately upheld the constitutionality of the policy in a 4-3 decision.<sup>1</sup> Applying the standard of strict scrutiny, the Court’s decision re-affirmed decades of precedent establishing that postsecondary institutions had a compelling interest in furthering a diverse student body and held that, as implemented by the university, the use of race was narrowly tailored to this goal. Justice Kennedy, who for the first time found a race-conscious policy in education to be narrowly tailored, authored the majority opinion in the case.<sup>2</sup>

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1 Justice Kagan recused herself in light of her past involvement in the case endorsing the university’s race-conscious admissions policy, and Justice Scalia had passed away, so only seven Justices voted in the case. Overall, the Court issued two separate opinions in the case. The 2016 decision followed a 2013 ruling remanding the case to the lower court, (*Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) [hereinafter *Fisher I*]), a second ruling from the lower court upholding (yet again) the constitutionality of the policy (*Fisher v. University of Tex. at Austin*, 758 F.3d 633 (5<sup>th</sup> Cir. 2014)) and an extremely rare decision by the Court to agree to hear the case for a second time (*Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198 (2016) [hereinafter *Fisher II*]).

2 In two past cases, *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003), and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 706 (2007), Justice Kennedy found the consideration of race in a postsecondary admissions policy, and a voluntary student assignment desegregation policy, respectively, not to be narrowly tailored.

Across various concurring and dissenting opinions, it was apparent that the Justices viewed and treated in conflicting ways the non-legal sources<sup>3</sup> submitted to inform their ruling in the case. To help inform future research and litigation efforts, this Article explores how the Justices used<sup>4</sup> such non-legal sources and *amicus curiae* briefs in their opinions in *Fisher I* and *Fisher II* and the implications for colleges and universities broadly, the social science research community specifically, and *amici*, going forward. This examination is important because the Court's decisions provide the contours around which colleges and universities must operate. Understanding how non-legal sources and *amicus curiae* briefs were cited and interpreted within this framework will illuminate the ways in which these sources can be relevant for educational policies and practices and continuing legal developments.<sup>5</sup>

In Part II, to set the context for this Article and situate the analysis within existing scholarship, we summarize research on the Court's use of social science evidence as well as the Court's use of *amicus* briefs. In Part III, to provide background for the cases on which we focus, we briefly summarize *Fisher I* and *Fisher II*. In Part IV, we examine how the Justices used non-legal sources and *amicus* briefs in their opinions to address the constitutional question in the case. Overall, the Justices cited a range of non-legal sources and *amicus* briefs to support various factual, legal, or contextual determinations in their opinions. The non-legal sources included items such as news articles (media), journal articles in the areas of education and law, and books. Our analysis reveals that across the various opinions, the ways the Justices conceptualized (1) the manifestation of race (*i.e.*, as skin color alone or as socially constructed in a number of ways) and (2) classifications on the basis of race (*i.e.*, as whether the classification itself involves racial discrimination or not) informed their use of non-legal sources and *amicus* briefs and the extent to which they were relevant to the Justices' various factual, legal, or contextual determinations. In Part V, we discuss the implications for colleges and universities of the Court's use of non-legal sources, including social science evidence, and *amicus* briefs in their ruling. We present the lines of research that may be important for scholars to pursue as judges and colleges and universities continue to debate the role race should play in postsecondary policies and practices.

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3 We employ the term non-legal sources to include the range of sources that the Justices cited in their opinions and that fall outside the traditional "legal" sources such as legal cases, statutes, or regulations. These sources, which include, in part, demographic data, news sources, books, law journal articles, and education articles, may have come to the attention of the Justices via the parties, *amicus* briefs, or their own searches. For a complete list of categories of non-legal sources cited in *Fisher I* and *Fisher II*, see Patricia Marin, Catherine L. Horn, Karen Miksch, Liliana M. Garces & John T. Yun, *Use of Extra-Legal Sources in Amicus Curiae Briefs Submitted in Fisher v. University of Texas at Austin*, 24 Educ. Pol'y Analysis Archives (forthcoming 2018) (setting forth 20 types of non-legal sources cited in all *amicus* briefs filed in *Fisher I* and *II* and analyzing relative use of each type of source by supporting party and category of *amici*).

4 We define "use" as both explicit citations to such sources as well as instances in which the Justices' conclusions reflect the conclusions or findings of social science research.

5 Two new challenges to the constitutionality of race-conscious policies at Harvard University and UNC-Chapel Hill, for example, are making their way through the lower courts and may ultimately reach the Supreme Court. See Brittany N. Ellis, *The Harvard Admissions Lawsuit Explained*, The Harvard Crimson, Nov. 7, 2016, <http://www.thecrimson.com/article/2016/11/7/harvard-admissions-lawsuit-explainer/>; *UNC's affirmative action lawsuit moves forward with Supreme Court ruling*, The Daily Tarheel, Nov. 20, 2016, <http://www.dailytarheel.com/article/2016/11/uncs-affirmative-action-lawsuit-moves-forward-with-supreme-court-ruling>.

## II. The U.S. Supreme Court's Use of Non-Legal Sources and Amicus Curiae Briefs

Research has examined the Justices' use of social science, *amicus curiae* briefs,<sup>6</sup> and other non-legal sources that have been presented to the Court in support of one side or the other of a case.<sup>7</sup> To be sure, the extent to which non-legal sources such as social science research *should* inform judicial decision making on questions of constitutional significance remains a disputed normative question.<sup>8</sup> After all, social science research is not free of subjectivity and can call into question prior accepted findings depending on the advancement of research methods. Indeed, some conflicting findings reflect the normal development of science, which depends on the accumulation of knowledge gathered over time, and across multiple contexts, by many different scholars. For these reasons, while social science research has informed constitutional questions,<sup>9</sup> disputes often arise over whether such evidence is consistent enough to be a reliable basis for legal action. For the purposes of this Article, what is most compelling is that non-legal sources and *amicus* briefs continue to be submitted to the Court and the Court continues to incorporate some of these sources into their opinions, thereby motivating our analysis.

Social science research has played an increasing role in the legal advocacy before the U.S. Supreme Court as well as in its judicial opinions most notably since the 1954 *Brown v. Board of Education* decision.<sup>10</sup> Although not the first use of modern social science, *Brown's* footnote 11 citing seven psychological and sociological studies is considered a turning point for the Court's consideration, and inclusion of, empirical evidence in its opinions.<sup>11</sup> That increased use of social science by legal advocates and the Supreme Court has generated a body of research examining these phenomena. For example, historical studies have analyzed the evolution of the incorporation of more social science into the Court's thinking and opinions.<sup>12</sup> Empirical analyses have investigated the frequency of social science citations by

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6 For this Article, we treat *amicus* briefs as a source of evidence that can be cited by the Court. In other work (see Marin et al., *supra* note 3) we further disentangle all the sources that can be cited within *amicus* briefs themselves.

7 As it is beyond the scope of the Article to discuss this entire body of scholarship, we focus on examples that are most relevant to this Article.

8 See Erica Frankenberg & Liliana M. Garces, *The Use of Social Science in Parents Involved and Meredith: Implications for Researchers and Schools*, 46 U. Louisville L. Rev. 703, 706 (2007); Liliana M. Garces, *Social Science Research and the Courts: Informing Post-Grutter v. Bollinger Developments in Higher Education Cases*, 27 Educ. Pol'y 591, 593 (2013).

9 See, e.g., Angelo N. Ancheta, *Scientific Evidence and Equal Protection of the Law* (2006) (discussing line of constitutional cases in which social science evidence has been deemed relevant).

10 See Catherine L. Horn & Patricia Marin, *Higher education and affirmative action: Understanding and enhancing the use of policy research in informing decision-making* (Nov. 2012); Garces, 2013, *supra* note 8 at 592; Ancheta, 2006, *supra* note 9; Rosemary J. Erickson & Rita J. Simon, *The Use of Social Science Data in Supreme Court Decisions* (1998).

11 See Ancheta, 2006, *supra* note 9; Erickson & Simon, *supra* note 10.

12 See, e.g., Thomas G. Hansford & Kristen Johnson, *The Supply of Amicus Curiae Briefs in the Market for Information at the U. S. Supreme Court*, 35 Just. Sys. J. 362 (2014).

the Court,<sup>13</sup> as well as differing citation patterns among the Justices and between majority and dissenting opinions.<sup>14</sup> A related body of scholarly work characterizes the Justices' use of social science as unpredictable. For example, some have focused on the instances in which the Court has ignored social science,<sup>15</sup> others have described the misinterpretation of research by the Court,<sup>16</sup> and yet others have discussed the misuse of social science by the Court.<sup>17</sup> Overall, a review of existing scholarship reveals that such evidence has been presented to the courts and cited in decisions, ultimately informing the jurisprudence in various cases.<sup>18</sup>

Most recently in the context of postsecondary education in *Grutter v. Bollinger*<sup>19</sup> and *Gratz v. Bollinger*,<sup>20</sup> the Court again demonstrated that scientific evidence and expert testimony can play important roles in constitutional analysis. Justice O'Connor's majority opinion in *Grutter* cited multiple research studies that addressed the educational benefits of racial and ethnic diversity to support the Court's conclusion that institutions of higher education have a compelling interest in the educational benefits of a diverse student body.<sup>21</sup> Various research studies were also relevant to the Court's narrow tailoring analysis.<sup>22</sup> By referencing such studies, the Court acknowledged that legal determinations can be supported by non-legal sources that speak to the relationship between fact and law.

In addition, much of the social science (and other non-legal sources) put before the Court is done so via *amicus curiae* briefs, the submission of which has increased markedly over time.<sup>23</sup> Work seeking to understand the impact of these briefs, however, has shown mixed results.<sup>24</sup> Similarly, studies have varied in their

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13 See, e.g., James R. Acker, *Thirty Years of Social Science in Supreme Court Criminal Cases*, 12 Law & Pol'y 1 (1990).

14 See James R. Acker, *Research on the Death Penalty. A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986-1989*, 27 Law & Soc'y Rev. 65 (1993).

15 See, e.g., Craig Haney & Deana Dorman Logan, *Broken Promise: The Supreme Court's Response to Social Science Research on Capital Punishment*, 50 J. Soc. Issues 75 (1994).

16 See, e.g., Paul S. Appelbaum, *The Empirical Jurisprudence of the United States Supreme Court*, 13 Am. J. L. & Med. 335 (1987).

17 Donald Bersoff & David Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research*, 2 U. Chi. L. Sch. Roundtable 279 (1995).

18 See, e.g., Frankenberg & Garces, *supra* note 8.

19 *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

20 *Gratz v. Bollinger*, 539 U.S. 244, 269 (2003).

21 *Grutter*, 539 U.S. at 330 (citing relevant studies).

22 See, e.g., Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, The Civil Rights Project (2003), available at <http://www.civilrightsproject.ucla.edu/research/affirmativeaction/tristate.pdf>; Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida*, The Civil Rights Project (2003), available at <http://www.civilrightsproject.ucla.edu/research/affirmativeaction/florida.pdf>.

23 See Reagan W. Simpson & Mary R. Vasaly, *The Amicus Brief: Answering the Ten Most Important Questions About Amicus Practice* (4th ed. 2015).

24 See, e.g., Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who*

findings with respect to the conditions that produce strategically useful products.<sup>25</sup> Regardless of the impact or of the “doubts about the utility of conducting research to influence the judicial policy-making process”,<sup>26</sup> the increased use of *amicus* briefs suggests that *amici* are convinced of their value<sup>27</sup> due to “their perceived impact on the Court’s decisions.”<sup>28</sup>

### III. The U.S. Supreme Court’s Decisions in *Fisher v. University of Texas at Austin*

#### A. *Fisher I*

When the Supreme Court heard *Fisher* in 2012, many in the higher education community were concerned that the Court would reverse, or severely limit, prior rulings upholding the constitutionality of race-conscious practices in postsecondary admissions.<sup>29</sup> Given the composition in the Court, few observers expected the 7-1 opinion in 2013 that sent the case back to the Fifth Circuit for further review, leaving in place the core principles that allowed for race-conscious policies.<sup>30</sup> In its ruling, the Court clarified that the lower court had to conduct its independent determination of whether the race-conscious policy is necessary (*i.e.*, narrowly tailored) for the university to obtain the educational benefits of a diverse student

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*Participates, When, and How Much?*, 52 J. Pol. 782 (1990); Paul M. Collins, Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (2008); Paul M. Collins, Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U. S. Supreme Court Opinion Content*, 49 Law & Soc’y Rev. 917 (2015); Allison O. Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757 (2014); Claire B. Wofford, *Assessing the Anecdotes: Amici Curiae, Legal Rules, and the U.S. Supreme Court*, 36 Just. Sys. J. 274 (2015).

25 See Julie Margetta Morgan & Diana Pullin, *Challenges and Strategies for Bridging Gaps Between Law and Research*, 39 Educ. Researcher 515 (2010); Katie Zuber, Udi Sommer & Jonathon Parent, *Setting the Agenda of the United States Supreme Court? Organized Interests and the Decision to File an Amicus Curiae Brief at Cert*, 36 Just. Sys. J. 119 (2015).

26 See Charles Robert Tremper, *Sanguinity and Disillusionment Where Law Meets Social Science*, 11 Law & Hum. Behav. 267, 270 (1987).

27 See Jonathon Alger & Marvin Krislov, *You’ve Got to Have Friends: Lessons Learned From the University of Michigan Cases*, 30 J.C. & U.L. 503 (2004); Caldeira & Wright, 1990, *supra* note 24.

28 Simpson & Vasaly, *supra* note 23, at 11.

29 Concern over the future permissibility of race-conscious practices was warranted, due to the composition of the Court. Four Justices—Chief Justice Roberts and Justices Alito, Thomas, and Scalia—had voted to strike down the use of race in admissions policies under any circumstances, and Justice Kennedy had dissented in *Grutter*, which upheld the constitutionality of race-conscious policies in postsecondary admissions on the grounds that the University of Michigan Law School’s policy was a disguised quota. Only three other current Justices—Sotomayor, Breyer, and Ginsburg—have supported race-conscious policies in education. Justice Kagan, who might have sided with the latter group, recused herself in light of her involvement in the case in the early stages of litigation. Thus, with Justice Kennedy as the swing vote, UT Austin’s policy could have been struck down as unconstitutional in a 5-3 vote or, with a 4-4 tie, left in place based on the lower court’s ruling that the policy is constitutional.

30 Other analyses have described the Court’s 2013 decision to remand the case to the lower court—rather than to overrule the lower court’s decision 5-3 or let it stand with a tie vote, as the composition of the Court suggested—as a compromise. See Mark Walsh, *Fiery Draft Dissent by Sotomayor Influenced Race Case*, New Book Says, Education Week, Oct. 10, 2014, [http://blogs.edweek.org/edweek/school\\_law/2014/10/fiery\\_draft\\_dissent\\_by\\_sotomay.html](http://blogs.edweek.org/edweek/school_law/2014/10/fiery_draft_dissent_by_sotomay.html).

body. The Court’s decision also clarified the importance of considering workable “race-neutral”<sup>31</sup> alternatives, stating that if a non-racial approach could promote diversity “about as well and at tolerable administrative expense,”<sup>32</sup> then the university could not consider race directly.<sup>33</sup>

## ***B. Fisher II***

Following remand, and after reconsidering the case, the Fifth Circuit concluded that UT Austin’s admissions policy met the Court’s requirements, as clarified in its 2013 opinion. Fisher then appealed, arguing that the Fifth Circuit still had not applied the Court’s requirements in past cases correctly, and the Court, in a rare move, agreed to hear the case again. The constitutional question the Court addressed in *Fisher II* was: whether UT Austin’s race-conscious admissions policy met strict scrutiny requirements as interpreted in prior cases, including the 2013 *Fisher* decision. Part of the determination concerned whether the university would be allowed to complement the percent plan with a race-conscious holistic review (an affirmation of the Fifth Circuit’s ruling) or whether the percent plan was deemed sufficient (disagreeing with the lower court).<sup>34</sup>

## **IV. The Justices’ Use of Non-Legal Sources and *Amicus curiae* Briefs**

In this Part, we examine the Justices’ use of non-legal sources and *amicus curiae* briefs in their various opinions. For our analysis, we define “use” as both explicit citation as well as instances in which the Justices’ conclusions reflected the conclusions or findings of a non-legal source.<sup>35</sup> In some instances, we highlight areas where the conclusions in the cited non-legal sources were refuted by other sources, primarily social science research. To be sure, even when the opinions do

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31 There is substantial debate as to whether policies can be deemed “race-neutral,” particularly when they have racial consequences or are based on racial considerations (*see, e.g.*, Eduardo Bonilla-Silva, *Racism Without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America* (4<sup>th</sup> ed. 2014)). In the legal context, however, a policy is deemed “race-neutral” when it does not explicitly reference race, even if it indirectly considers race. This artificial legal definition led Justice Ginsburg to state in her dissent in *Fisher I*, “I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives [*i.e.*, the Top Ten Percent Plan] as race unconscious” (at 2433).

32 *Fisher I*, at 2420.

33 Justice Thomas filed a concurring opinion in which he agreed with the determination that the lower court did not apply strict scrutiny, but disagreed with the need to send it back to the lower court. Rather than remanding the case to the lower court, he would categorically prohibit the consideration of race under the Equal Protection Clause. Only Justice Ginsburg dissented, on the grounds that the facts were sufficient to find the university’s use of race constitutional without a remand.

34 See Liliana M. Garces, *Balancing Liberty and Equality: Justice Kennedy’s Decisive Vote in Fisher v. University of Texas*, Part II, 44 *Educ. Researcher* 442, 443–44 (2015) for a longer explanation of the legal issues in the case.

35 It is important to note that the latter is not based on a systematic, exhaustive analysis of the opinions and is intended simply to be illustrative of alignment between conclusions in a Justice’s opinion and findings from non-legal sources, particularly social science research. While we highlight most of the instances where the Justices cite non-legal sources, in some instances we limit our discussion to some examples that illustrate the major take-away.

not explicitly reference a non-legal source or an *amicus* brief, it is possible that, at some point in time, the Justice used or was informed by such a source or brief in his or her deliberation. It is also possible that a non-legal source or *amicus* brief that includes information similar to those already cited would not be cited to avoid duplication. Thus, the fact that a non-legal source is not explicitly cited does not mean that it was not used; there are many other types of influence that our analysis cannot capture. Accordingly, the following question guided our main analysis: If a Justice cited / used non-legal sources or an *amicus* brief in his or her opinion, what factual, legal, or contextual determination did it support?

Overall, the Justices cited a range of non-legal sources and *amicus* briefs to support various factual, legal, or contextual determinations in their opinions. Our analysis reveals that across the various opinions, the way the Justices conceptualized (1) the manifestation of race (*i.e.*, as skin color alone or as socially constructed in a number of ways) and (2) classifications on the basis of race (*i.e.*, as whether the classification itself involves racial discrimination or not) informed their use of non-legal sources and *amicus* briefs and the extent to which they were relevant to the Justices' various factual, legal, or contextual determinations. On the first point, Justice Kennedy's opinion, for example, illustrates an understanding of race that is contextual—that is, one that can operate alongside other factors and that can be relevant to the experiences of all students. Justice Alito's opinion, on the other hand, reflects a definition of race that appears to be limited to skin color. With this lens, he cites to the same non-legal sources from the factual record that Kennedy relies on, but to reach the opposite conclusion that race is “omnipresen[t]” in the university's admissions policy. These conflicting definitions of the ways race manifests informed their use of non-legal sources and *amicus* briefs.

On the second factor underlying the Justice's different uses of non-legal sources—whether the racial classification itself involves racial discrimination—Justice Kennedy's and Justice Ginsburg's opinion reflect an understanding of the Equal Protection Clause that allows for the consideration of race to address the ongoing significance of race and racial inequities. Under this reading, non-legal sources submitted in the factual record were sufficient to meet the various elements of narrow tailoring, and for Ginsburg in particular, to satisfy constitutional requirements even before the Court remanded the case to the Fifth Circuit. By contrast, Justice Thomas' and Justice Alito's opinions reflect an “anti classification” reading of the Equal Protection Clause; that is, one that equates racial classifications with racial discrimination. From this perspective, any non-legal sources that relate to the educational benefits of diversity are irrelevant. Because the classification itself is harmful, it cannot be tolerated under the principle of Equal Protection much less constitute a compelling interest. Under this view, instead, the non-legal sources that are relevant instead are those that, like for Thomas, demonstrate the harms to student of color, such as those that are alleged under a mismatch theory, or like for Alito, non-legal sources that support arguments for why the university's goals are a “pretext” for racial discrimination. These different understandings of the Equal Protection Clause by various Justices thus informed the ways they cited non-legal sources as well as *amicus* briefs.

Below, we start with Kennedy's majority opinions in *Fisher I* and *Fisher II* and then we discuss other Justices' opinions in the order in which they appear in each

case. Proceeding in this way allows us to highlight the connection between each of the Justice’s conceptualization of race and racial classifications and his, or her, use of non-legal sources in the respective opinion.

### ***A. Justice Kennedy’s Majority Opinion in Fisher I<sup>36</sup> and Fisher II<sup>37</sup>***

An important feature of Justice Kennedy’s majority opinions in both *Fisher I* and *Fisher II* are his references to evidence from the record—the 2004 Proposal, findings from the university’s survey of students, affidavits, and depositions—and an *amicus* brief to support factual conclusions and legal determinations in the case. Throughout both opinions, Kennedy takes evidence from the record at face value; that is, he finds it sufficient to establish factual conclusions and to meet the elements of narrow tailoring in the case. As we discuss in a section below, this is an approach that is in stark contrast to how Justice Thomas in *Fisher I* and Justice Alito in *Fisher II* consider these same sources.

#### *1. Factual Conclusions*

In setting forth the factual conclusions in *Fisher I* and *Fisher II*, Kennedy cites to demographic data and other non-legal sources submitted in the record to conclude that the University’s race-conscious admission, combined with the Top Ten Percent Plan (TTP), resulted in a student body that was more racially diverse than the student body that was admitted under other admissions regimes (pre-*Hopwood* and pre-TTP, as well as post-*Hopwood*, pre-race-conscious policy). Kennedy also cites to the factual record to outline the steps that the University took before implementing its race-conscious policy. He cites to the University’s Proposal in 2014, which relied on findings from several sources, including a study that showed that few undergraduate classes containing between 5 and 24 students “had significant enrollment by members of racial minorities” and “reports from students regarding their ‘interaction in the classroom.’”<sup>38</sup> Kennedy also cites to the record to summarize the various factors that go into a determination of admission, including essays and other factors that contribute to an applicant’s scores. Based on these factors, he concludes that race is ultimately considered in an “indirect” fashion; that is, it is “contextual”<sup>39</sup> and does not operate as a “mechanical factor.”<sup>40</sup> He also notes that the consideration of race can be relevant for individuals from any racial group, including Whites and Asian Americans. In making this point, he cites to the *Amicus Curiae* Brief for Asian American Legal Defense and Education Fund et al. for the proposition that “the contention that the University discriminates against Asian-Americans is ‘entirely unsupported by evidence in the record or empirical data.’”<sup>41</sup> This is an important reference that stands in stark contrast to the conclusions Thomas and Alito make in their respective opinions.

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36      Joined by Chief Justice Roberts, Justices Scalia, Thomas, Breyer, Alito, and Sotomayor.

37      Joined by Justices Breyer, Sotomayor, and Ginsburg.

38      *Fisher I*, at 2416; *Fisher II*, passim.

39      *Fisher II*, at 2207.

40      *Id.*

41      *Id.*



## 2. Legal Determinations on Narrow Tailoring

In addition to establishing the factual conclusions, Kennedy cites to the non-legal sources from the record to support various legal determinations related to the narrow tailoring elements in the case. These legal determinations include: (a) whether the university's interests are concrete and precise; (b) whether the university offered a reasoned and principled explanation for its race-conscious policy; and (c) whether the consideration of race was necessary given the sufficiency of other race-neutral efforts or the impact of race-conscious admissions on the diversity of the student body. In addressing each of these points, Kennedy cites to the non-legal sources in the record to conclude that the university's policy meets each of these requirements.

On the first element, he states: "The record reveals that in first setting forth its current admissions policy, the University articulated concrete and precise goals."<sup>42</sup> Specifically, he states: "On the first page of its 2004 'Proposal to Consider Race and Ethnicity in Admissions,' the University identifies the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the promot[ion of] cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry" [citing the supplemental appendix, depositions, and affidavits] [internal quotes omitted].<sup>43</sup> To conclude that the university has offered a "'reasoned, principled explanation' for its decision to pursue these goals," Kennedy references "The University's 39-page proposal" that "was written following a year-long study, which concluded that '[t]he use of race-neutral policies and programs ha[d] not been successful' in 'provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society'" [citing the supplemental appendix and affidavits].<sup>44</sup>

Finally, in concluding that the consideration of race was necessary, Kennedy cites to non-legal sources in the record that supported the university's position. He states, the "University conducted "months of study and deliberation, including retreats, interviews, [and] review of data," App. 446a, and concludes that "[t]he use of race-neutral policies and programs ha[d] not been successful in achieving" sufficient racial diversity at the University, Supp. App. 25a".<sup>45</sup> He notes, "The record itself contains significant evidence, both statistical and anecdotal, in support of the

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42 *Id.* at 2211.

43 *Id.*

44 *Id.* As we note below, Justice Alito dismisses the relevance of this evidence on the grounds that it is "self-serving" (*Fisher II*, at 2223).

45 *Fisher II*, at 2211. In considering the empirical evidence, Kennedy limits the bounds of the evidence to that which was available to UT at the time of Ms. Fisher's application to UT. In doing so, he dismisses "extra-record" evidence Justice Alito relies on in his dissent, while bringing attention to the importance of ongoing studies that the University needs to undertake to defend its race-conscious policy from legal threat in the future (a point we address in more detail below).

University's position."<sup>46</sup> The anecdotal evidence he refers to includes "evidence that minority students admitted under the *Hopwood* regime experienced feelings of loneliness and isolation. See, e.g., App. 317a–318a."<sup>47</sup> He states, "This anecdotal evidence is, in turn, bolstered by further, more nuanced quantitative data,"<sup>48</sup> which includes findings from the university's report regarding the number of African American or Latino students in small undergraduate classes. Finally, Kennedy cites to evidence related to "the many ways in which [the University] already had intensified its outreach efforts to those students," including the fact that the university "created three new scholarship programs, opened new regional admissions centers, increased its recruitment budget by half-a-million dollars, and organized over 1,000 recruitment events. Supp. App. 29a–32a; App. 450a–452a (citing affidavit of Michael Orr ¶¶ 4–20)."<sup>49</sup>

### 3. Legal Determinations on Narrow Tailoring Reflecting Findings of Social Science Research

Notably, the conclusions Kennedy draws about each of the elements of the narrow tailoring analysis often reflects the findings from social science research even though he does not always cite to specific sources. For example, in addressing petitioner's argument that the university lacked a defined goal by not specifying a level of minority enrollment that would constitute a "critical mass," Kennedy states: "Increasing minority enrollment may be instrumental to [the] educational benefits [of diversity], but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers."<sup>50</sup> Instead, Kennedy draws attention to the importance of "provid[ing] an educational setting that fosters cross-racial understanding ... [and] enlightened discussion and learning."<sup>51</sup> Both of these conclusions draw attention to the experiences of students, not only their numbers on colleges campuses, as an important component for attaining the educational benefits of diversity. This important connection reflects findings of research that was submitted to inform the Court's deliberation in the case in a number of *amicus* briefs in support of the university.<sup>52</sup>

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46 *Id.* at 2212.

47 *Id.*

48 *Id.*

49 *Id.* at 2213.

50 *Id.* at 2210.

51 *Id.* at 2211.

52 See, e.g., *Amicus Curiae* Brief of the American Educational Research Association et al., *Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), at \*5 in support of Petitioner (citing to multiple studies finding that more numbers of students of color, coupled with institutional support and strategies for meaningful intergroup interaction, is effective in decreasing prejudice by encouraging both formal and informal intergroup contact and friendships, as well as increasing students' cognitive abilities, critical thinking skills, and civic engagement); Brief of 823 Social Scientists as *Amici Curiae* in Support of Respondent, *Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), at \*18 (citing to analyses of decades of research on diversity finding that numbers alone do not generate educational benefits; rather, the interactions that take place among students, the particular contexts of these interactions, and the conditions that help facilitate productive interactions generate the exchange of ideas that are necessary for realizing the educational benefits of diversity).

## ***B. Justice Thomas's Concurring Opinion in Fisher I (joined by Justice Scalia)***

In his concurring opinion in *Fisher I*, Justice Thomas, joined by Justice Scalia, cites a broad range of non-legal sources—books, law journal articles,<sup>53</sup> education journal articles,<sup>54</sup> policy reports,<sup>55</sup> and news media<sup>56</sup>—to support the overall argument that the educational benefits that flow from diversity do not constitute a compelling interest. His use of non-legal sources throughout the opinion mostly provides contextual support for these legal determinations, all of which reflect a fundamental disagreement with Kennedy on whether racial classifications are the equivalent of racial discrimination.<sup>57</sup> Reflecting an anti-classification understanding of the Equal Protection Clause, Thomas considers racial classifications to be the same as racial discrimination. From this perspective, the “alleged educational benefits of diversity cannot justify racial discrimination today.”<sup>58</sup> By equating racial classifications with racial discrimination, he renders any research related to the educational benefits of diversity as irrelevant to the legal determinations in the case. As he states, “just as the alleged educational benefits of segregation were insufficient to justify racial discrimination then [citing *Brown*], the alleged educational benefits of diversity cannot justify racial discrimination today.”<sup>59</sup>

### *1. Contextual Support for Anti-Classification Understanding of the Equal Protection Clause*

Throughout the opinion, Thomas advances several conclusions about the university's policy that render it unconstitutional under his reading of the Equal Protection Clause as prohibiting all types of racial classifications. A substantial part of his opinion, for instance, cites text presented in legal briefs submitted by the main parties in the cases that accompanied the *Brown* case. He cites the text of these briefs to equate the rationale for race-conscious policies in *Fisher* to those that were advanced in support of segregated schools during the litigation in *Brown*. In making these arguments, he uses non-legal sources as contextual support for his argument. In addressing one of the arguments made against the desegregation of schools (*i.e.*, that public schools would decline in quality or cease to exist altogether), he cites to a book that documented such consequences: “[a]fter being ordered to desegregate, Prince Edward County closed its public schools from the summer of 1959 until the fall of 1964.”<sup>60</sup>

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53 Including an article published in the University California Law Review (*see infra* for text accompanying note 69).

54 These include articles published in the Journal of Negro Education and Research in Higher Education (*see infra* notes 64, 75).

55 Including reports published by the National Science Foundation and American Association of Medical Colleges (*see infra* note 76).

56 Such as a CNN report (Monika Plocienniczak, *Pennsylvania School Experiments with 'Segregation,'* CNN (Jan. 27, 2011) <http://www.cnn.com/2011/US/01/27/pennsylvania.segregation/index.html>).

57 This disagreement is based on an understanding of the Equal Protection Clause from an anti-classification versus anti-subordination perspective. *See, e.g.*, John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 Fordham L. Rev. 423, 436–38 (2002).

58 *Fisher I*, at 2424–25.

59 *Id.*

60 *Id.* at 2426 (citing R. Sarratt, *The Ordeal of Desegregation* 237 (1966)).

Thomas also uses non-legal sources to demonstrate that the university's policy is a "pretext" for discrimination—discrimination that even if presented as "benign" is nevertheless racial discrimination. In a lengthy paragraph, for example, Thomas cites various books that quoted speeches of slaveholders who "argued that slavery was a 'positive good' that civilized blacks and elevated them in every dimension of life."<sup>61</sup> In one of the citations to a legal brief in *Briggs*,<sup>62</sup> which argued that "separate schools protected black children racist white students and teachers,"<sup>63</sup> he explicitly includes a parenthetical to note that the brief was quoting an article by DuBois.<sup>64</sup> Because both involve racial discrimination, Thomas argues that there is no principled distinction between the University's assertion that diversity yields educational benefits and the segregationists' arguments that segregation also yielded those same benefits.<sup>65</sup>

## 2. Legal Determinations on Harms to Students

In addition, Thomas argues that the university's race-conscious policy has insidious consequences for those who are admitted under the policy. In advancing this line of argument, he ignores the relevance of research on the benefits of diversity, while simultaneously relying on non-legal sources that argue the opposite, including those in support of the "mismatch" theory.<sup>66</sup> On this point, he cites to several sources, including the *Amicus Curiae* Brief for Richard Sander et al.<sup>67</sup> and a book by Thomas Sowell that advances the mismatch theory.<sup>68</sup> In a statement that

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61 *Id.*, at 2429 (citing text from various books).

62 34 U.S. 350 (1952).

63 *Fisher I*, at 2430.

64 W.E.B DuBois, *Does the Negro Need Separate Schools?*, 4 J. Negro Educ. 328, 330-31 (1935).

65 In a footnote, Thomas acknowledges the difference that "the segregationists argued that it was *segregation* that was necessary to obtain the alleged benefits, whereas the University argues that *diversity* is the key" (*Fisher I*, at 2428, n.3). He also notes that "Today, the segregationists' arguments would never be given serious consideration," while citing to a news media report by CNN (*supra* note 56) as a "*but see*," to illustrate that similar efforts are taking place today.

66 Conceptually, mismatch suggests that admitted students with test scores below those of their peers at an institution do not perform as well and would therefore be better served by attending institutions where the average standardized test scores are similar to their own.

67 Specifically, Thomas states that "Blacks and Hispanics admitted to the University as a result of racial discrimination are, on average, far less prepared than their white and Asian classmates. In the University's entering class of 2009, for example, among the students admitted outside the Top Ten Percent plan, blacks scored at the 52d percentile of 2009 SAT takers nationwide, while Asians scored at the 93d percentile [citing brief for Richard Sander et al. as *amici curiae*]" (*Fisher I*, at 2431).

68 Thomas cites Thomas Sowell, *Affirmative Action Around the World*, 145-46 (2004) in support of the argument that "the University's discrimination has a pervasive shifting effect" of admitting "minorities who otherwise would have attended less selective colleges where they would have been more evenly matched" (*Fisher I*, at 2431). A number of *amicus* briefs filed in support of the university challenged the theory of mismatch as well as the findings from work that claims to support it. *See., e.g.*, Brief of Empirical Scholars as *Amicus Curiae* in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), *passim* (citing multiple studies and articles rebutting methodology and research design of Sander and Taylor's studies, including statistical errors and regression analysis that could not produce credible estimates of causation, as well as rebutting claims that their work is unchallenged and presenting findings directly contradictory to theirs in terms of educational outcomes for minority students); Brief of *Amicus Curiae* the American Psychological

appears to dismiss the large body of research disputing the mismatch argument and findings, he notes:

Tellingly, neither the University nor any of the 73 *amici* briefs in support of racial discrimination has presented a shred of evidence that black and Hispanic students are able to close this substantial gap during their time at the University. Cf. Thernstrom & Thernstrom, *Reflections on the Shape of the River*, 46 UCLA L. Rev. 1583, 1605–1608 (1999) (discussing the failure of defenders of racial discrimination in admissions to consider the fact that its “beneficiaries” are underperforming in the classroom).<sup>69</sup>

Thomas goes on to directly quote from a book: “It is a fact that in virtually all selective schools ... where racial preferences in admission is practiced, the majority of [black] students end up in the lower quarter of their class.”<sup>70</sup> He speculates that “[t]here is no reason to believe this is not the case at the University”<sup>71</sup> and accuses “The University and its dozens of *amici*” as being “deafeningly silent on this point”<sup>72</sup> Emphasizing the harms for students admitted under race-conscious policies, he states: “Setting aside the damage wreaked upon the self-confidence of these overmatched students, there is no evidence that they learn more at the University than they would have learned at other schools for which they were better prepared. Indeed, they may learn less.”<sup>73</sup> With these statements, he categorically dismisses the large body of work demonstrating contrary findings.<sup>74</sup>

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Association in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*29–31 (citing research purporting mismatch hypothesis is empirically flawed and ignores other influences on student performance and persistence); Brief *Amicus Curiae* of the National Education Association, et al., in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*32–34 (citing criticisms of Sander’s flawed methodology and inability of studies using the same data and other analytical approaches to replicate Sander’s findings); Brief of the American Educational Research Association et al. as *Amici Curiae* in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*26–31 (citing to multiple analyses questioning empirical foundations and methodological soundness of studies purporting mismatch). See also Brief *Amicus Curiae* for Richard Lempert in Support of Respondents, *Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), *passim* (citing to multiple analyses that criticize methods employed by Sander and that question results of his findings, their replicability, and problematic assumptions regarding ordering of tiers of schools, and utilizing quantity of studies at odds with Sander’s work to show how Sander has attempted to create false consensus around mismatch theory by ignoring critics and contradictory findings). Thomas, however, dismisses the relevance of the social science studies cited in these briefs, which dispute in great detail the methodology and interpretation of the findings of the sources he cites.

69 *Fisher I*, at 2431.

70 *Id.* (citing “S. Cole & E. Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* 124 (2003)”).

71 *Id.*

72 *Id.*

73 *Id.*

74 See, e.g., Brief *Amicus Curiae* Kimberley West-Faulcon in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*19–23 (citing to multiple studies showing higher graduation rates among minority students attending elite institutions where their admissions scores are below those of institution’s White average and lack of strong (or any) predictability of scores such as LSAT or SAT for academic performance of minority students);

Thomas cites non-legal sources to support additional arguments related to the harms of the university's policy, including "some evidence that students admitted as a result of racial discrimination are more likely to abandon their initial aspirations to become scientists and engineers than are students with similar qualifications who attend less selective schools."<sup>75</sup> He provides contextual support for his argument by citing reports by the National Science Foundation and the American Association of Medical Colleges that illustrate: "The success of historically black colleges at producing graduates who go on to earn graduate degrees in science and engineering."<sup>76</sup>

### C. Justice Ginsburg's Dissenting Opinion in Fisher I

Similar to Justice Thomas, Justice Ginsburg cites *amicus* briefs and non-legal sources as contextual support for her legal determinations and underlying understanding of what is permitted by the Equal Protection Clause.

#### 1. Contextual Support for Legal Determinations

Ginsburg cites *amicus* briefs to support the statement that the university's race-conscious policy is "like so many educational institutions across the nation."<sup>77</sup>

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Brief of *Amicus Curiae* the American Psychological Association in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*29–31 (citing multiple studies finding that graduation rates for minority students increase with selectivity of institution); Brief *Amici Curiae* of 28 Undergraduate and Graduate Student Organizations Within the University of California in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*25–26 (citing multiple studies documenting that graduation rates increase for under-represented minorities with selectivity of institution, including studies that selectivity increase benefited African American students more than White students and that selectivity was only statistically significant factor affecting African American graduation rates); Brief for the National Black Law Students Association as *Amicus Curiae* in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*13–15, 24 (citing to multiple studies finding that Black students are more likely to graduate from selective institutions than less-selective institutions and that Black students in lowest category of SAT scores graduated at progressively higher levels as institutional selectivity increased); Brief of the American Educational Research Association et al. as *Amici Curiae* in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*24–32 (citing to multiple studies finding that internal stigma among minority undergraduate students was significantly lower in minority students at schools with race-conscious admissions and that minority students nationwide and at public Texas institutions had higher graduation rates at more selective institutions than at those less-selective institutions where their admissions credentials would have made them a better "match").

75 *Fisher I*, at 2431–32 (citing "Elliott, Strenta, Adair, Matier, & Scott, The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions, 37 Research in Higher Educ. 681, 699–701 (1996)").

76 *Id.* at 2432, n.5 (citing "National Science Foundation, J. Burrelli & A. Rapoport, InfoBrief, Role of HBCUs as Baccalaureate–Origin Institutions of Black S & E Doctorate Recipients 6 (2008) (Table 2)" and "American Association of Medical Colleges, Diversity in Medical Education: Facts & Figures 86 (2012) (Table 19)").

77 Specifically, she references "Brief for Amherst College et al. as *Amici Curiae* 33–35; Brief for Association of American Law Schools as *Amicus Curiae* 6; Brief for Association of American Medical Colleges et al. as *Amici Curiae* 30–32; Brief for Brown University et al. as *Amici Curiae* 2–3, 13; Brief for Robert Post et al. as *Amici Curiae* 24–27; Brief for Fordham University et al. as *Amici Curiae* 5–6; Brief for University of Delaware et al. as *Amici Curiae* 16–21" (*Fisher I*, at 2433, n.5).

In demonstrating that other institutions follow the university's approach, she suggests that any ruling by the Court that changes prior case law would affect many other institutions, a concern that Justice Breyer shared during the oral argument in *Fisher I*.<sup>78</sup> In addition to providing this broader context for the impact of the Court's ruling, Ginsburg cites to non-legal sources as contextual support for the determination that the Top Ten Percent Plan is not race-neutral, but race-conscious. In a memorable quote, she stated: "Only an ostrich could regard the supposedly neutral alternative as race unconscious."<sup>79</sup> She writes: "It is race consciousness, not blindness to race, that drives such plans," and in an accompanying footnote cites to a book that included a law professor's famous statement: "'If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind.'"<sup>80</sup>

## 2. Understanding of Ongoing Significance of Race Reflecting Findings of Social Science Research

Importantly, in her opinion, Ginsburg references her understanding of the ongoing significance of race, an understanding that reflects findings of research studies cited in *amicus* briefs submitted in support of the university. Quoting her dissent in *Gratz*, in *Fisher I* she states: "I have several times explained why government actors, including state universities, need not be blind to the lingering effects of 'an overtly discriminatory past,' the legacy of 'centuries of law-sanctioned inequality.'"<sup>81</sup> Numerous *amicus* briefs submitted in support of the university summarized research findings documenting the lingering effects of government-sanctioned racial segregation and other ways in which race continues to influence educational outcomes and opportunity.<sup>82</sup> For these reasons, Ginsburg "remain[s]"

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78 In addressing the lawyer for Abigail Fisher, Justice Breyer asks, "Why overrule a case into which so much thought and effort went and so many people across the country have depended on" (Transcript of Oral Argument at \*8, lines 12-14, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345)).

79 *Fisher I*, at 2433.

80 *Id.* (citing "T. Arnold, *The Symbols of Government* 101 (1935)").

81 *Id.* at 2433. See also *Gratz*, 539 U.S. at 300–01 (noting that "[b]ias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice").

82 See, e.g., *Amicus Brief of the Lawyer's Committee for Civil Rights Under Law in Support of Respondent, Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*6–11 (summarizing research findings demonstrating ongoing racial disparities in education, employment, criminal justice, healthcare, and other sectors in society); Brief of Social and Organizational Psychologists as *Amici Curiae* in Support of Respondent, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*27–29 (citing to studies finding continued negative impact of economic segregation on educational opportunities and outcomes of minority students); Brief of *Amici Curiae* Coalition of Bar Associations of Color in Support of Respondent, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*16–20 (citing research documenting history of exclusion and segregation and its connection to present day racial inequities in education); Brief of National Latino Organizations as *Amici Curiae* in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*31–34 (citing research demonstrating connection between former de jure and present de facto school racial segregation); Brief of *Amicus Curiae* the American Psychological Association in Support of Respondents, *Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), at \*10–18 (citing numerous research findings documenting detrimental effects of sub-conscious racial bias on educational outcomes by race).

convinced [that policies] that candidly disclose their consideration of race [are] preferable to those that conceal it.”<sup>83</sup> As she stated in *Gratz*, the recognition of race in policies is important because it can help counter the negative effects of subconscious racialized judgments.<sup>84</sup> Ginsburg’s view reflects a reading of the Equal Protection Clause that allows for state actors to address the continuing importance of race. As she states: “the Constitution, properly interpreted, permits government officials to respond openly to the continuing importance of race.”<sup>85</sup>

#### ***D. Justice Alito’s Dissenting Opinion in Fisher II***<sup>86</sup>

Like Justice Thomas’s dissent, Justice Alito’s dissent in *Fisher II* cites to a range of non-legal sources and *amicus curiae* briefs<sup>87</sup> that include: evidence from the record, demographics statistics,<sup>88</sup> education journals,<sup>89</sup> books,<sup>90</sup> policy reports,<sup>91</sup> news sources,<sup>92</sup> and college reports/admissions standards/guidelines. Like Kennedy, Alito cites evidence from the record, and from non-legal sources, to support factual and legal conclusions as well as contextual support for critique of the university’s goals. Unlike Kennedy, he finds the factual record insufficient to meet the elements of narrow tailoring. Specifically, his arguments negate the relevance of the evidence in the record by outlining parameters of evidence that are missing. At the same time, he relies on findings from non-legal sources, including research, that support his criticism of the university’s race-conscious policy. His criticism is based on a fundamental understanding of the Equal Protection Clause as one that calls for “race-neutrality,” reflecting an anti-classification reading of the Equal Protection Clause, and a definition of race that is limited to skin color.

##### *1. Factual Conclusions*

In Part I of the opinion, Alito cites to non-legal sources to support a number of factual conclusions. For example, he cites to evidence in the factual record to support his conclusion that UT had achieved a high (and presumably sufficient)

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83 *Fisher I*, 133 S. Ct. at 2433–34 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 305 n.11 (2003)).

84 *Gratz v. Bollinger*, 539 U.S. 244, 299–301, 304–05 (2003) (Ginsburg, J., dissenting).

85 *Id.* at 305 n.11.

86 Joined by Chief Justice Roberts and Justice Thomas.

87 These include *amicus curiae* briefs submitted by the following organizations and/or individuals: the Cato Institute, Judicial Education Project, California Institute of Technology, Amherst, Experimental Psychologists, Asian American Legal Foundation et al., Judicial Watch, and Six Educational Nonprofit Orgs.

88 Including demographic data from the U.S. Census Bureau, the Department of Education, and UT’s office of admissions (*see infra* notes 108, 118, 124, and 126).

89 Such as articles published in the Journal of Blacks in Higher Education and Harvard Educational Review (*see infra* notes 127 and 128).

90 Including SAT Wars by Soares (*see infra* note 128).

91 Those published by the Pew Research Center and the University of Texas system (otherwise referred to as the “Kroll Report”) (*see infra* notes 110 and 119).

92 These include articles published in the Dallas Morning News, Wall Street Journal, Washington Post, and National Law Journal (*see infra* notes 95, 111, 126, 127).



level of racial diversity under the TTP. He states: “By 2004—the last year under the holistic, race-neutral AI/PAI system—UT’s entering class was 4.5% African-American, 17.9% Asian-American, and 16.9% Hispanic. Supp. App. 156a. The 2004 entering class thus had a higher percentage of African-Americans, Asian-Americans, and Hispanics than the class that entered in 1996, when UT had last employed racial preferences.”<sup>93</sup> Next, Alito cites to the record to support factual conclusions related to the steps UT undertook before introducing the consideration of race after *Grutter* implicitly overruled *Hopwood*. Alito cites to a string of news media reports, for example, to support the conclusion that for the university, the “reintroduction of race into the admissions process was anything other than a foregone conclusion” the very day *Grutter* was handed down. Based on these news media accounts, Alito dismisses the Proposal and the accompanying studies that the university undertook the year after *Grutter*, going as far as saying “there is no evidence”<sup>94</sup> to support the contention that the university engaged in such deliberations.

In addition, Alito cites to the record to support the view that race is an “omnipresent” factor in the university’s policies, and in doing so relies on the same evidence Kennedy relied on, but to reach the opposite conclusion. Alito states:

Because an applicant’s race is identified at the front of the admissions file, reviewers are aware of it throughout the evaluation.” 645 F.Supp.2d, at 597; see also *id.*, at 598 (“[A] candidate’s race is known throughout the application process”). Consideration of race therefore pervades every aspect of UT’s admissions process. See App. 219a (“We are certainly aware of the applicant’s race. It’s on the front page of the application that’s being read [and] is used in context with everything else that’s part of the applicant’s file”).<sup>95</sup>

For these reasons, he rejects the university’s argument that “race is a factor of a factor” or a “contextual” determination.

While relying on evidence from the record to support a conclusion about “the omnipresence of racial classifications”<sup>96</sup> in the university’s policy, Alito also faults it for failing to “keep any statistics on how many students are affected by the consideration of race in admissions decisions [or] “how many minority students are affected in a positive manner by the consideration of race.”<sup>97</sup> He concludes that “UT thus makes no effort to assess how the individual characteristics of students admitted as the result of racial preferences differ (or do not differ) from those of students who would have been admitted without them.”<sup>98</sup> Because

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93 *Fisher II*, at 2218.

94 *Id.* at 2219.

95 *Id.* at 2220 (further citing to an editorial by former UT President Bill Powers published in the National Law Journal, “Powers, Why Schools Still Need Affirmative Action, National L. J., Aug. 4, 2014, p. 22”, for the proposition that “UT considers its use of racial classifications to be a benign form of ‘social engineering’”).

96 *Id.*

97 *Id.*

98 *Id.*

Alito’s argument relies primarily on “racial classifications” that are devoid of other contextual factors, in his mind, the consideration of race can be isolated for having determined a student’s “odds of admission.”<sup>99</sup> And because race is a factor that can be isolated, Alito faults the university for not presenting evidence that demonstrates its consideration for “each” applicant—evidence that he would also find relevant for the elements of narrow tailoring.<sup>100</sup> In this way, Alito’s use of non-legal sources reflects a fundamental disagreement with Kennedy’s majority opinion about the definition (or manifestations) of race and the role it plays in the university’s determinations.

## 2. Legal Determinations

### 1. Necessity of Race-Conscious Means

Overall, Alito dismisses the relevance of the non-legal sources Kennedy cites to support legal determinations in the case. He dismisses it on the grounds that it fails to demonstrate what is needed to show that race is necessary to further the university’s compelling interest. In reference to the survey study of students’ experiences, Alito faults the university for failing to demonstrate that “its race-conscious plan actually ameliorates this situation.”<sup>101</sup> He faults the university for presenting “no evidence that its admissions officers, in administering the ‘holistic’ component of its plan, make any effort to determine whether an African-American, Hispanic, or Asian-American student is likely to enroll in classes in which minority students are underrepresented”<sup>102</sup> He notes:

although UT’s records should permit it to determine without much difficulty whether holistic admittees are any more likely than students admitted through the Top Ten Percent Law [citation omitted] to enroll in the classes lacking racial or ethnic diversity, UT either has not crunched those numbers or has not revealed what they show.<sup>103</sup>

Alito also finds evidence from the Proposal insufficient: “The Proposal did not analyze the backgrounds, life experiences, leadership qualities, awards, extracurricular activities, community service, personal attributes, or other characteristics of the minority students who were already being admitted to UT under the holistic, race-neutral process.”<sup>104</sup> Alito thus focuses on data that is missing in a manner that ultimately dismisses the data that was sufficient for Kennedy’s factual and legal conclusions.

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99 *Id.*

100 It is worth noting that this approach presents a catch-22 for the university. If the university could provide such evidence, then it would open itself to legal vulnerability for a process that makes race a determinative factor and not holistic. Yet, by not being able to provide the evidence, they fail to satisfy the standard Alito requires for strict scrutiny.

101 *Id.* at 2216.

102 *Id.*

103 *Id.*

104 *Id.* at 2219.

Alito also faults the university for failing to demonstrate that its race-conscious admissions helped address the concern over the number of students of color in smaller undergraduate classes. He states:

As far as the record shows, UT failed to even scratch the surface of the available data before reflexively resorting to racial preferences. For instance, because UT knows which students were admitted through the Top Ten Percent Plan and which were not, as well as which students enrolled in which classes, it would seem relatively easy to determine whether Top Ten Percent students were more or less likely than holistic admittees to enroll in the types of classes where diversity was lacking. But UT never bothered to figure this out. See *ante*, at 2209 (acknowledging that UT submitted no evidence regarding “how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review”). Nor is there any indication that UT instructed admissions officers to search for African-American and Hispanic applicants who would fill particular gaps at the classroom level.<sup>105</sup>

Without this evidence, according to Alito, the university cannot demonstrate that the consideration of race is needed.

## 2. *Precision of the University’s Goal and Critical Mass*

Alito cites non-legal sources to support the conclusion that university’s interests are not “concrete or precise.”<sup>106</sup> In response to Kennedy’s references to the university’s Proposal as evidence of the specified goals the university sought to meet, Alito dismisses the relevance of such evidence on the grounds that: “If a university can justify racial discrimination simply by having a few employees opine that racial preferences are necessary to accomplish these nebulous goals, see *ante*, at 2210–2211 (citing *only* self-serving statements from UT officials), then the narrow tailoring inquiry is meaningless.”<sup>107</sup> By referring to the statements as “self-serving,” Alito questions the reliability of such sources. The extent to which the evidence from the factual record was relevant for informing a legal determination, therefore, seemed to depend on whether it supports the university’s case (in which case it is suspect and not relevant), or whether it refutes it (in which case it is not suspect, but relevant). This ideological position as a metric for considering the relevance of research is also one that Justice Thomas appears to adopt, a metric that does not bode well for researchers or colleges and universities that seek to use research to inform their deliberations.

In addition to whether the evidence can be considered “self-serving” or not, Alito would require the university to present evidence that supports the necessity of a race-conscious policy before the policy is put into place. The evidence the university considered, before reintroducing race into its policy, however, was not sufficient for Alito. Instead, what Alito requires, in part, are statistics about how many students are affected by the consideration of race and which students are

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105 *Id.* at 2226–27.

106 *Id.* at 2223.

107 *Id.*

admitted as a result of a race-conscious system or under a race-neutral process. His rationale also appears to require evidence that demonstrates the *lack of educational benefits* of diversity when race-conscious policies are not in place (that is, under a race-neutral process), a standard that would position many diversity-related studies, which focus on capturing the educational outcomes from diverse peers and environments, incomplete in their findings and potentially irrelevant.

Alito also cites non-legal sources, particularly demographic characteristics, to support the argument that the university's goals, including obtaining a critical mass, are akin to racial balancing. Citing facts published by the U.S. Census, Alito asks:

Does critical mass depend on the relative size of a particular group in the population of a State? For example, is the critical mass of African-Americans and Hispanics in Texas, where African-Americans are about 11.8% of the population and Hispanics are about 37.6%, different from the critical mass in neighboring New Mexico, where the African-American population is much smaller (about 2.1%) and the Hispanic population constitutes a higher percentage of the State's total (about 46.3%)?<sup>108</sup>

Referencing the Proposal's "numerical assessments of the racial makeup of the student body," Alito faults the university for "resort[ing] to a simple racial census," "instead of focusing on the benefits of diversity."<sup>109</sup> In doing so, Alito dismisses the relevance of the findings from the students' survey and their educational experiences.

### 3. *Good Faith Determination of Race-Neutral Alternatives*

Expanding on a point raised in Part I of his opinion, Alito draws from what Kennedy refers to as "extra record" evidence to question the university's motives in its admissions policies and its "good faith" determination of alternatives to race-conscious admissions. Alito cites a report published by the UT system that conducted an investigation of the university's policies to support the conclusion that "UT maintained a clandestine admissions system that evaded public scrutiny until a former admissions officer blew the whistle in 2014."<sup>110</sup> In addition, he cites the report and a news article to support the conclusion that:

Under this longstanding, secret process, university officials regularly overrode normal holistic review to allow politically connected individuals—such as donors, alumni, legislators, members of the Board of Regents, and UT officials and faculty—to get family members and other friends admitted to UT, despite having grades and standardized test scores substantially below the median for admitted students.<sup>111</sup>

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108 *Id.* at 2224 (citing "United States Census Bureau, QuickFacts, online at <https://www.census.gov/quickfacts/table/PST045215/35,48> (all Internet materials as last visited June 21, 2016)").

109 *Id.* at 2225.

110 *Id.* at 2240 (citing "Kroll, Inc., University of Texas at Austin—Investigation of Admissions Practices and Allegations of Undue Influence 4 (Feb. 6, 2015) (Kroll Report)").

111 *Id.* Citing pp. 12–14 of the Kroll Report and "Blanchard & Hoppe, Influential Texans Helped

In his majority opinion, Kennedy explicitly rejects the relevance of the report and the news media accounts on the grounds that they are “extra record” materials (*i.e.*, not submitted during the time of the litigation in the lower courts), tangential to the case, and because the university did not have “a full opportunity to respond” to them.<sup>112</sup> In a lengthy footnote citing to the brief for the respondent and several *amicus* briefs, Alito disputes all of these points, highlighting the instances in which the university responded to the allegations in the report, the relevance of the findings to a “good faith” determination, and its “hollow” concern about considering “extra record” materials when it, too, affirmed the Fifth Circuit’s opinion, which according to Alito, “relied heavily” on its “own extrarecord internet research.”<sup>113</sup>

#### 4. *Discrimination Against Asian Americans*

Alito dedicates a substantial part of his opinion to addressing the role Asian American students play in the university’s admissions policy. Specifically, Alito finds the university’s policy to “discriminate against Asian-American students”<sup>114</sup> and cites to text from an *amicus* brief filed in support of the Petitioner to note that: “In UT’s view, apparently, ‘Asian Americans are not worth as much as Hispanics in promoting “cross-racial understanding,” breaking down “racial stereotypes,” and enabling students to ‘better understand persons of different races.’”<sup>115</sup> To bolster this point and demonstrate that the university’s policy discriminates against Asian Americans, Alito cites to various *amicus* briefs to provide a historical context of discrimination against Asian Americans. He states: “the Court’s willingness to allow this ‘discrimination against individuals of Asian descent in UT admissions is particularly troubling, in light of the long history of discrimination against Asian Americans, especially in education.’”<sup>116</sup> Kennedy’s and Alito’s citation to the *amicus* briefs that support their respective conclusions illustrates the role these briefs can play in providing contextual or rhetorical support for the legal determinations in the case, a focus that has implications for future cases.

#### 5. *Definition of Racial Categories and Race*

Alito also cites to *amicus* briefs and non-legal sources to criticize the university’s “crude” racial categories and the definition (or lack thereof) of various racial and

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Underqualified Students Get Into UT, Dallas Morning News, July 20, 2015, online at <http://www.dallasnews.com/news/education/headlines/20150720-influential-texans-helped-underqualified-students-get-into-ut.ece> (“Dozens of highly influential Texans—including lawmakers, millionaire donors and university regents—helped underqualified students get into the University of Texas, often by writing to UT officials, records show”).

112 *Id.* at 2211–12.

113 *Id.* at 2240, n.18.

114 *Id.* at 2227.

115 *Id.* (citing “Brief for Asian American Legal Foundation et al. as *Amici Curiae* 11 (representing 117 Asian-American organizations”).

116 *Id.* at 2228 (citing Brief for Asian American Legal Foundation et al. as *Amici Curiae*).

ethnic groups.<sup>117</sup> Using the example of Asian Americans, he cites two different *amicus* briefs submitted in support of the petitioner to demonstrate the varied backgrounds that are captured by such a broad category, including “individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world’s population.”<sup>118</sup> He also cites to demographic data published by the U.S. Census Bureau and a report by the Pew Research Center to support the statement that an increasing number of individuals describe “themselves as multiple races” and “marry a spouse of a different race or ethnicity.”<sup>119</sup> Based on these sources, Alito concludes that the U.S. is “rapidly becoming” a “more integrated country.”<sup>120</sup> He seems to define “integration” based on the percentage of individuals who report interracial marriage, a conception of race that is based on biology and/or color of one’s skin.

Alito also questions whether a student’s race is connected to a varied perspective in the classroom, a view that categorically dismisses findings from social science research demonstrating the connection in light of the history of the U.S. For instance, he asks: “If an applicant has one grandparent, great-grandparent, or great-great-grandparent who was a member of a favored group, is that enough to permit UT to infer that this student’s classroom contribution will reflect a distinctive perspective or set of experiences associated with that group? UT does not say.”<sup>121</sup> In doing so, Alito not only disagrees with precedent in *Grutter* (where the majority opinion authored by Justice O’Connor acknowledged the connection between race and experiences that contribute a different perspective), but ignores findings from a large body of research studies demonstrating the relationship between race and backgrounds and experiences. *Amicus* briefs submitted in support of the university summarized the research that supported these arguments.<sup>122</sup> It is

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117 This question of racial categories was one that a four-Justice block, including Alito, in a concurring opinion in *Parents Involved* rendered the school districts’ voluntary race-conscious student assignment policies unconstitutional (551 U.S. at 2743–44. Kennedy, J. joined with respect to Parts I, II, III & III.C) (noting that the district’s plan was too “broad,” and “imprecise” in utilizing categories of only “white” and “non-white,” and did not state a clear necessity for use of racial classifications).

118 *Id.* at 2229 & n.6 (citing Brief for Asian American Legal Foundation et al. as *Amici Curiae* in *Fisher I* and Brief for Judicial Watch in *Fisher II*).

119 *Id.* at 2230, n.7 (citing “United States Census Bureau, 2010 Census Shows Multiple-Race Population Grew Faster Than Single-Race Population (Sept. 27, 2012), online at <https://www.census.gov/newsroom/releases/archives/race/cb12-182.html>”) and n.8 (citing “W. Wang, Pew Research Center, Interracial Marriage: Who Is ‘Marrying Out’? (June 12, 2015), online at <http://www.pewresearch.org/fact-tank/2015/06/12/interracial-marriage-who-is-marrying-out/>; W. Wang, Pew Research Center, The Rise of Intermarriage (Feb. 16, 2012), online at <http://www.pewsocialtrends.org/2012/02/16/the-rise-of-intermarriage/>”).

120 *Id.* at 2230.

121 *Id.*

122 See, e.g., Brief of *Amici Curiae* the Leadership Conference on Civil and Human Rights and the Southern Poverty Law Center, et al., in Support of Respondents in, *Fisher v. University of Tex.* at Austin, 136 S. Ct. 2198 (2016) (No. 14-981), at \*21 (citing numerous studies finding that students’ race and/or ethnicity plays a role in shaping their perspectives and worldviews); Brief of Teach for America et al. as *Amici Curiae* in Support of Respondents, *Fisher v. University of Tex.* at Austin, 136 S. Ct. 2198 (2016) (No. 14-981), at \*19 (citing multiple studies supporting conclusion that schools should include information about applicants’ racial and ethnic identities in addition to socioeconomic status to truly capture existing viewpoints and experiences); Brief of *Amici Curiae* for the American Jewish

not surprising that Alito ignores the relevance of this research, as his rationale illustrates a definition of race that is a-contextual and a-historical.

### 3. Contextual Support to Question the Candid Nature of the University's Interest

Alito relies on research findings to support the argument that the university's race-conscious policy is based on "unsupported assumptions" about African-American and Hispanic students admitted through the Top Ten Percent Plan. He cites to non-legal sources to support the argument that the university's interest in "diversity within diversity" reflects an interest in seeking the "right type" of student, that is, one that is wealthy or has high standardized test scores. Across a long section of his opinion, for example, Alito cites statistics from the Department of Education, the U.S. Census Bureau, the university's office of admission, and the record, to support the conclusions that African-American and Hispanic students admitted through the Top Ten Percent Plan: (a) have the education levels that far exceed the norm in Texas,<sup>123</sup> (b) have income levels that exceed the Texas median,<sup>124</sup> and (c) earned a higher mean grade point average than those admitted outside of the Top Ten Percent Law.<sup>125</sup>

On this last point, Alito cites to a news media article from the Washington Post documenting findings from "nationwide studies" "showing that high school

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Committee, Union for Reform Judaism, Central Conference of American Rabbis, and Women of Reform Judaism in Support of Respondents, *Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), at \*16 (citing various studies finding experience of racial discrimination, race consciousness, and different "culturally related experiences" of members of different racial and ethnic groups will directly impact perspectives).

123 For example, on pages 2232–33, Alito writes: "In 2008, when petitioner applied to UT, approximately 79% of Texans aged 25 years or older had a high school diploma, 17% had a bachelor's degree, and 8% had a graduate or professional degree. Dept. of Educ., Nat. Center for Educ. Statistics, T. Snyder & S. Dillow, *Digest of Education Statistics 2010*, p. 29 (2011). In contrast, 96% of African-Americans admitted through the Top Ten Percent Plan had a parent with a high school diploma, 59% had a parent with a bachelor's degree, and 26% had a parent with a graduate or professional degree. See UT, Office of Admissions, *Student Profile, Admitted Freshman Class of 2008*, p. 8 (rev. Aug. 1, 2012) [citation omitted]. Similarly, 83% of Hispanics admitted through the Top Ten Percent Plan had a parent with a high school diploma, 42% had a parent with a bachelor's degree, and 21% had a parent with a graduate or professional degree. *Ibid.* As these statistics make plain, the minorities that UT characterizes as "coming from depressed socioeconomic backgrounds," Tr. of Oral Arg. 53 (Dec. 9, 2015), generally come from households with education levels exceeding the norm in Texas."

124 Specifically, on page 2233, Alito notes: "In 2008, the median annual household income in Texas was \$49,453. United States Census Bureau, A. Noss, *Household Income for States: 2008 and 2009*, p. 4 (2010), online at <https://www.census.gov/prod/2010pubs/acsbr09-2.pdf>. The household income levels for Top Ten Percent African-American and Hispanic admittees were on par: Roughly half of such admittees came from households below the Texas median, and half came from households above the median. See 2008 Student Profile 6. And a large portion of these admittees are from households with income levels far exceeding the Texas median. Specifically, 25% of African-Americans and 27% of Hispanics admitted through the Top Ten Percent Plan in 2008 were raised in households with incomes exceeding \$80,000. *Ibid.*"

125 Citing the record, Alito states on p. 2234: "Indeed, the statistics in the record reveal that, for each year between 2003 and 2007, African-American in-state freshmen who were admitted under the Top Ten Percent Law earned a higher mean grade point average than those admitted outside of the Top Ten Percent Law. Supp. App. 164a. The same is true for Hispanic students. *Id.*, at 165a."

grades are a better predictor of success in college than SAT scores.”<sup>126</sup> and to two education journal articles (both published in the *Harvard Educational Review*), three separate *amicus* briefs filed in support of the respondent, and another media report, for the proposition that the SAT “has often been accused of reflecting racial and cultural bias” and “clearly correlate[s] with wealth.”<sup>127</sup> As further contextual support for this argument, Alito cites to an education journal article, a book, and numerous examples of institutions that do not require the SAT or ACT.<sup>128</sup>

On a separate point, Alito cites to figures from the U.S. Census bureau to question the logic of the university’s interest in seeking demographic parity to avoid isolation. He states: “linking racial loneliness and isolation to state demographics is illogical. Imagine, for example, that an African-American student attends a university that is 20% African-American. If racial isolation depends on a comparison to state demographics, then that student is more likely to feel isolated if the school is located in Mississippi (which is 37.0% African-American) than if it is located in Montana (which is 0.4% African-American) [citing U.S. Census Bureau]. In reality, however, the student may feel—if anything—*less* isolated in Mississippi, where African-Americans are more prevalent in the population at large.”<sup>129</sup>

## V. Implications for Postsecondary Institutions, Researchers, and *Amici*

Our analysis indicates that the Justices utilized non-legal sources and *amicus* briefs in a variety of ways and toward vastly different ends in their opinions. One important overarching consideration is that the ideological differences of the Justices are part and parcel of the review of the constitutional questions involved in the affirmative action debate. As we noted, our analysis reveals that across the various opinions, the way the Justices conceptualized: (1) the manifestation of race (*i.e.*, as skin color alone or as socially constructed in a number of ways) and (2) classifications on the basis of race (*i.e.*, as whether the classification itself involves racial discrimination or not) informed their use of non-legal sources and *amicus* briefs and the extent to which they were relevant to the various factual, legal, or contextual determinations. In this Part, we first consider the broad lessons of our analysis for colleges and universities that employ race-conscious admissions, including lessons for general counsels and administrators. Next, we discuss the implications for researchers who seek to contribute to the legal debate as well as

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126 *Fisher II*, at 2234, n.10 (citing “Strauss, Study: High School Grades Best Predictor of College Success—Not SAT/ACT Scores, *Washington Post*, Feb. 21, 2014, online at <https://www.washingtonpost.com/news/answer-sheet/wp/2014/02/21/a-telling-study-about-act-sat-scores/>”).

127 *Id.* at n.11 (citing “Freedle, Correcting the SAT’s Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores, 73 *Harv. Ed. Rev.* 1 (2003)”, “Santelices & Wilson, Unfair Treatment? The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning, 80 *Harv. Ed. Rev.* 106, 127 (2010)”) and n.12 (citing “Zumbrun, SAT Scores and Income Inequality: How Wealthier Kids Rank Higher, *Wall Street Journal*, Oct. 7, 2014, online at <http://blogs.wsj.com/economics/2014/10/07/sat-scores-and-income-inequality-how-wealthier-kids-rank-higher/>”).

128 *Id.* at n.13 (citing “Wake Forest Presents the Most Serious Threat So Far to the Future of the SAT, *The Journal of Blacks in Higher Education*, No. 60 (Summer 2008), p. 9” and “J. Soares, SAT Wars: The Case for Test-Optional College Admissions 3 (2012)”).

129 *Id.* at 2236.



to inform policy as postsecondary institutions comply with the Court's decision. Finally, we conclude with thoughts for individuals and organizations considering the submission of *amicus* briefs in future Supreme Court cases.

### *A. Implications for Colleges and Universities*

Our analysis reinforces the legal boundaries and needed documentation, as well as collaborations with researchers, that exist for colleges and universities as they consider how to enact admissions procedures and, potentially, defend them in court. The university, for example, was challenged to consider the question of how much "diversity" was developed through the Top Ten Percent Plan versus holistic admissions, reminding universities of the need to explore and document the outcomes associated with "race-neutral" alternatives aimed at obtaining racial and ethnic diversity. The Justices' citation to the factual record and the non-legal sources that were submitted as part of that record further demonstrates the need for colleges and universities to continue to document and gather evidence of the benefits of diversity, and to do so by engaging in important collaborations with researchers, within or outside the university. Specifically, via the sources they cited, the Justices in *Fisher* reinforced what was outlined in *Grutter*: that there is a need for institutions to carefully document the educational benefits of diversity derived from implemented admissions processes. The findings of this study further suggest the importance of introducing such evidence early in the litigation process.

Related, universities need to clearly document the steps they undertake to realize the benefits of diversity *after* admissions. As Justice Kennedy wrote in the majority opinion—"Increasing minority enrollment may be instrumental to [the] educational benefits [of diversity]," but so is "provid[ing] an educational setting that fosters cross-racial understanding...[and] enlightened discussion and learning."<sup>130</sup> In this way, the Court emphasized an "educational setting" that allows for the educational benefits of diversity to occur. Kennedy's use of the factual record, particularly the student survey, in his decision, also pointed to the importance of considering student experience when justifying race-conscious admissions policies. In so doing, the Court's decision (and cited non-legal sources from the factual record) focused on the experiences of students in a way that prior decisions on affirmative action had not—shifting from a numbers-focused diversity approach to one that also considers efforts to realize the educational benefits of diversity. This shift requires that institutions not only attain numerical representation of students of color, but that they more fully document whether they are *obtaining* the educational benefits of diversity with policies and practices that promote the type of racial climate and environment that facilitates such benefits.<sup>131</sup>

Finally, the Justices' statements on the Top Ten Percent Plan and how the plan might be characterized (race-neutral or race-conscious), have implications for colleges

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130 *Id.* at 2211.

131 See, e.g., Garces, *supra* note 34; Liliana M. Garces & Uma M. Jayakumar, *Dynamic Diversity: Toward a Contextual Understanding of Critical Mass*, 43 *Educ. Researcher* 115 (2014).

and universities that may implement similar policies in the future.<sup>132</sup> Justice Ginsburg cites to a non-legal source as a rhetorical tool to emphasize the mental gymnastics that are needed to term the Top Ten Percent Plan “race-neutral.” The constitutionality of the Top Ten Percent Plan and whether it can be considered “race-neutral,” of course, was not a legal issue before the Court, yet, Ginsburg’s characterization of the plan may help bolster challenges to such plans on the grounds that they are “race-conscious.”<sup>133</sup> Subsequently, general counsels and administrators will need to consider the framing of alternatives they may employ.

### ***B. Implications for Researchers***

Moving forward, it will be important for researchers to work with their own universities to help in rigorous documentation of admissions procedures and outcomes, as well as race-neutral alternatives. In relying on the evidence from the record and finding it sufficient to meet the elements of narrow tailoring, for example, Justice Kennedy’s rationale draws attention to the importance of this evidence for justifying the university’s race-conscious policy in the future. Throughout the opinion in *Fisher II*, Kennedy references the importance of “regular evaluation of data and consideration of student experience” to ensure “that race plays no greater role than is necessary to meet [the university’s] compelling interest.”<sup>134</sup> He calls attention to: “[t]he type of data collected, and the manner in which it is considered,” as having “significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in the years to come.”<sup>135</sup> At the end of the opinion, Kennedy states: “The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.”<sup>136</sup> This clear reference to non-legal sources, and the need for additional evidence, provides many opportunities for researchers to engage by conducting studies to further inform the debate.

One important consideration for researchers will be communicating findings to broad audiences via various mediums. Social science will likely continue playing an illuminating role in critical matters to education, particularly as colleges and universities and advocates strive to ensure equality and opportunity for all students. Toward this end, the communication of findings of work to broad audiences, including the media, is critical. As our analysis revealed, Justices cited media reports that discussed the findings of a study instead of the study itself. Justice Alito, for example, cited to the Washington Post, which summarized findings from research studies on the SAT. This indicates that media sources may be serving as “proxies” for studies. This use heightens the importance of media sources for more effective communication of research to legal audiences.

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132     *See infra* Part IV.

133     *See infra* Part IV.

134     *Fisher II*, at 2210.

135     *Id.*

136     *Id.*, at 2214–15.

As researchers continue to conduct studies that may inform the Court's deliberations on these constitutional questions, it is also important to understand, as our analysis revealed, that the Justice's ideological positions may ultimately shape whether such research is deemed relevant or if it is cited in their opinions. As we noted, a number of *amicus* briefs in support of the university included findings from numerous studies that challenged the theory of mismatch as well as the findings from work that claims to support it. Justice Thomas, however, ignored the studies cited in these briefs, which dispute in great detail the methodology and interpretation of the findings of the sources he cites. As we demonstrate in our analysis, Thomas' (and Alito's) "anti-classification" reading of the Equal Protection Clause, which equates racial classifications with racial discrimination, shaped the consideration of the research and other non-legal sources. In contrast, Kennedy's and Justice Ginsburg's opinions reflect an understanding of the Equal Protection Clause that allows for the consideration of race to address the ongoing significance of race and racial inequities. Kennedy's majority opinion, moreover, reflects an understanding of race that is "contextual," an understanding of race that is also supported by research findings. These perspectives underscore the importance of research that documents the myriad ways in which race continues to manifest in U.S. society and to shape students' educational opportunities and life outcomes.

### *C. Implications for Future Amici*

While the utility of *amicus* briefs continues to be debated, it is clear in this case that the Justices do reference them in their opinions. In particular, Justice Kennedy's, Justice Ginsburg's, and Justice Alito's citation to the *amicus* briefs that support their respective conclusions illustrates the role these briefs can play in providing contextual or rhetorical support for the legal determinations in the case. Through the explicit references to *amicus* briefs filed on either side of the case, Kennedy and Alito shared their perspectives on the relevance of research for addressing the argument that race-conscious policies discriminate against Asian Americans. This exchange has particular implications for future cases, including current lawsuits against the University of North Carolina Chapel Hill and Harvard University that are making their way through the courts and may ultimately reach the Supreme Court. With the case against Harvard involving an Asian American plaintiff, the exchange provides insight into how the various Justices viewed the relevance of *amicus* briefs that addressed this issue.

Considering the findings from our analysis, individuals and organizations who believe they have a stake in the outcome of a case, or unique knowledge to contribute, might be encouraged to file briefs in future cases. Of course, not all briefs are cited; however, we note that some briefs, while not directly cited, are having an influence because their conclusions are reflected in the opinions of Justices. In sum, challenges to positions on either side of the issue allow *amici* to seek additional non-legal sources that might strengthen their arguments, as well as partner with researchers who may be able to assist in filling gaps in evidence.

## V. Conclusion

Ultimately, the Court in *Fisher II* upheld the constitutionality of race-conscious admissions. Throughout their opinions, the Justices cited non-legal sources and *amicus* briefs in conflicting ways, as informed by their respective positions on the interpretation of the Equal Protection Clause and their definitions of race. Understanding the Justice's use (or questioning) of non-legal sources is critical for those interested in presenting this type of evidence to the Court. As challenges to affirmative action continue, the Justices' use of non-legal sources and *amicus* briefs in *Fisher* suggests it is essential for colleges and universities to continue to document the need for their admissions policies, for researchers to communicate findings about this contentious issue to broad audiences via targeted mediums (particularly media sources) and for *amici* to continue to support their positions with various non-legal sources. Collaborations among institutions, researchers, and authors of *amicus* briefs may be specifically beneficial to derive and help translate the findings from research to legal audiences. These efforts will be important as social science continues to play an illuminating role in the decisions of the Supreme Court and, consequently, on educational policy.